***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

# 75-1136

To be argued by
PHYLIS SKLOOT BAMBERGER

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-against-

THOMAS MURPHY and
ROBERT WIDMAN,

Appellants.

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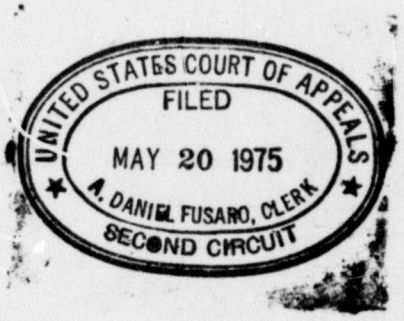
Docket No. 75-1136

## BRIEF FOR APPELLANT ROBERT WIDMAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK




WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT WIDMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel

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BRIEF FOR APPELLANT
ROBERT WIDMAN

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## QUESTION PRESENTED

Whether it was error to admit testimony that appellant Widman was one of the bank robbers because such testimony was the result of pretrial identification procedures which were impermissibly suggestive.

## STATEMENT PURSUANT TO RULE 28(a)(3)

### Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler) rendered on April 24, 1975, after a jury trial, convicting appellant Robert Widman of bank robbery while armed (18 U.S.C. §§2113(a), 2) and conspiracy (18 U.S.C. §813). Appellant Widman was sentenced pursuant to 18 U.S.C. §4208(a)(2) to fifteen years' imprisonment for the armed bank robbery and to five years' imprisonment for the conspiracy, the sentences to run concurrently.

This Court continued the assignment of The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

### Statement of Facts

It was undisputed that on May 9, 1974, at about 8:30 a.m., $73,594 (36*) was stolen from the Federally insured (36, Chase Manhattan Bank branch in Hollis, Queens. The robbery occurred prior to banking hours just as employees were arriving for their day's work. It was conducted by two men who

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*Numerals in parentheses refer to pages of the transcript of the trial. Numerals preceded by "S.H." refer to pages of the transcript of the suppression hearing.

required the employees to open the vaults (24-25), roll out the "buggies"* (25) kept in the vault, and unlock the buggies. When and if the two men did not need the assistance of an employee, that person was placed in the safe deposit cubicles used by bank customers when examining items in their safe deposit boxes.

The only disputed issue was the identity of the two men who robbed the bank.** According to the testimony, one of the men was tall, the other shorter. The Government's theory was that the tall man was appellant Widman and the other man Murphy.

Christina Jonke, the assistant manager of the bank, testified that the tall man appeared about seven or eight feet (40) in front of her holding in one hand a small black gun and, with his other hand, a handkerchief in front of his face. The handkerchief covered his face and mouth (28), and, although Mrs. Jonke could see the outer frame of his face and his eyes (39), she never saw all of his face (45). She viewed him with the handkerchief covering his face in good light for only

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*"Buggies" were a set of drawers on wheels. One buggy was allotted to each teller. The money used by the teller was kept in that buggy and the buggy was placed overnight in the vault. Keys to the buggies were kept by the teller using it and by the branch bank manager (95-96).

**Prior to trial, counsel made a motion to suppress evidence of identification pursuant to Simmons v. United States, 390 U.S. 377 (1968). The testimony at the resulting suppression hearing is treated together with the testimony at trial in this statement. It must be noted that each witness was asked to identify appellant at the hearing held immediately prior to trial.

aobut a minute (45).* He was six feet tall, weighed 220 pounds, had light-colored hair (24) "ruffled up high" (42), and light, ruddy skin (46).

In October 1974, Mrs. Jonke was shown a photographic spread (32). The spread consisted of twelve photographs -- one full face up to the shoulders and one profile -- of each of six men.** She selected the full face and profile of appellant. Of the photographs she was shown, only those of appellant had the full pompadour hairstyle that was a noted characteristic of the taller robber. In making her selection, Mrs. Jonke concentrated on the shape of the hairline, the shape of the face, and the eyes (43; S.H.15). She recalled no other photograph with a similar hairline and style (S.H.30; 43), and she testified at trial that she was only "pretty sure" it was the person (43).

A line-up was conducted on January 21, 1975, a photograph of which was introduced at trial as Exhibit #2 (34). The photograph shows that appellant was the only person with a pompadour hairstyle.***

Mrs. Jonke identified Number Four, appellant, as the robber (35). As with the photographic spread (44), she concentrated on the hairline and body characteristics; also as

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*Although Mrs. Jonke was with him longer, she did not look at him except for "a second or two" (48).

**This set of "October" photographs was shown to others, and testimony about them will be reflected in this brief. A description of the photographs is set out infra at 17-18, and the photographs will be lodged with this Court.

***That photograph will be lodged with this Court.

with the October photographic spread, no one else in the line-up had a similar hairline or body type (44; 46-47). In her testimony, Mrs. Jonke stated that someone else with these characteristics could have been the robber (47). On re-direct examination she said she was "fairly certain this man robbed the bank" (49). In court, Mrs. Jonke identified appellant as the taller of the two robbers.

Marie Daly, chief clerk of the bank, was apparently next to Mrs. Jonke when a man about six feet tall with dirty blond, thinning hair, and who weighed about 250 pounds and carried a small black gun (52) stood about eight feet from her (61) for about a minute (54). The man had a handkerchief in front of his face (53), and Ms. Daly did not see his full face (64). She had a side view and saw sideburns (61), but she did not see the man's eyes, and his ears were covered by his hair (59). The most prominent feature about the man was his very heavy build (62).* Ms. Daly was then taken to the safe deposit area of the bank. Shortly after the robbery, Ms. Daly was shown a photographic spread of small photographs (63), but she was not able to make an identification (58; S.H.51). This set of small photographs included "action" photos of six men, including appellant, all quite heavy in weight. The photographs do

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*Ms. Daly could not see the second man, who was standing behind another employee (52). She recalled only that he was about 5'9" tall, weighed about 170 pounds, and had a small body frame (53). She could not identify Murphy as the smaller man (67).

not reflect hair color, nor do they show any person with a pompadour haircut.*

Ms. Daly testified that she was shown a photographic spread in October, and that she slected appellant's photograph (57) as the man "resembling" the robber (64). She testified that each photograph shown her in the spread had only one characteristic she recalled: one had the hair, one the forehead, and one the body frame. She was not certain appellant was the man who had robbed the bank (65), because it was his photograph alone which had the features she recalled (S.H. 52, 65), and she believed he was the "type" of person (65). At the line-up on January 21, 1975, Ms. Daly selected appellant as "resembling" the robber (58). At trial, she stated that appellant "resembled" the taller robber (S.H. 43; 54-55), a conclusion she premised on his build, hair, and high forehead (55, 64). She could not positively identify him (64), and admitted she could be mistaken (65).

Barbara Ransom was a teller at the bank, and was stopped as she entered the bank by a man about 6'2" tall (73), heavy-set, and with a white handkerchief held in front of his face. His hairline was receding, and his light-colored hair was at the top of his head (72, 83).** She stared at him for about

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*This photograph will be lodged with the Court.

**The smaller man was about 5'8" with brown hair long on the sides (73). Ms. Ransom could not ifentify him from a photographic spread (79), and selected him in the courtroom only because he was the shorter of the two defendants (80).

six or seven seconds (83).*

Ms. Ransom stated that she was unable to identify anyone from the photographic spread (85).** At trial, Ms. Ransom selected two men as the taller robber (76-77). Co-counsel remarked that one of the two men was a United States Marshal, and the Judge ordered the remark stricken. Ms. Ransom then said she felt the robber was appellant (77). She made her selection based on appellant's hair and broad shoulders (78), and was not positive of her identification (86). She said it was a 50-50 chance that appellant was the man (87), and then that she could not definitely identify the man (90).***

Alice DeChiara was the first teller to arrive at the bank that day (94), and had gone downstairs to the ladies' room. She testified that a black-haired man, about 5'10" tall, holding a handkerchief over his face, instructed here to leave the ladies' room (93), and directed her to the safe deposit area of the bank (94).**** Later she was directed to unlock the

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*Earlier she had said six or seven minutes, but she admitted this was her error (83).

**Although she did not recall when she was shown the photographs, the photographs Ms. Ransom referred to were the large glossy prints used in the October spread.

***She stated that an FBI report which stated that she could make an identification was inaccurate (90).

****Ms. Chiara testified that later, when the smaller man was trying to empty the buggy, he must have dropped his handkerchief because she saw he wore a moustache (104). She testified that about a month after the robbery she was shown photographs relating to an identification of the shorter man. She did not testify whether she made a selection at the time (Exhibits #5G

buggy, but had to go back downstairs to retrieve her keys (96). The second man took her downstairs. Ms. Chiara said she never turned around (108) to look at this second man, but "had a feeling" (108) he was a big person (97), over six feet tall and weighing more than two hundred pounds (99), and from the corner of her eye (140) she saw that he had blond hair in a pompadour (98).

She testified that at the line-up she identified appellant, and stated:

> Yes, I think that the person that is here is the person that I thought was -- would be, would be the person.
>
> (110).
>
> I thought that this person that I had picked out in the line-up closely resembled what I thought was the person who had come with me on that particular day.
>
> (111).
>
> ... I don't think I have ever said anything different about that person, that he was tall, that he was [a] husky big person, that he had a blond bit of hair. And that is all I ever said. I can't say anything different. And from the line-up I would say that that person that I picked out from the line-up would go along with what I felt was the person....
>
> (145).

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(Footnote continued from page 7)

and 5H) (152), but stated in court that, on a scale of one to one hundred, one of the photographs was at "80" in resemblance to the second man in the bank (133). The same was true of her selection after viewing a line-up (134-135). However, in the line-up, she selected FBI Agent Jerry Lang (235-236).

Asked about what she saw in the line-up, Ms. DeChiara said:

> ... There were -- there was for instance like there was a person that was like might have been called husky, but he was very much shorter. There was a person that had very kinky type of hair and he was very tall and very severe, and he didn't have -- I don't think anybody was there that resembled the person that I thought might be except the person that I picked out.
>
> (145-146).

In the courtroom, Ms. DeChiara identified appellant (107) only because he was big and because of his hair, and said:

> I would say as much as I can remember the feeling that I had about it that it is -- that he does resemble the person.
>
> (143).

Lottie Hoggard, a general clerk at the bank, testified that when she entered the bank with Ms. Ransom, a tall, heavy man with light brown or blond hair (166) holding a handkerchief over his face told her to go to the safe deposit area (167).* She did not select a photograph from the spread, and could make no identification (177-178).

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*Ms. Hoggard identified the other man as being of medium build and with dark, long hair and a moustache (167). He, too, had a handkerchief on his face, but removed it (168), during which time she saw him for a split second once or twice (169). Ms. Hoggard testified that she selected a photograph resembling the robber from a spread solely because of the hair, moustache, and eyes (171). She was not sure it was the robber (175).

Joseph Leater, a security guard at the bank (246), saw a man behind one of the tellers. The man was built heavy, weighed 250 pounds (248), had messed up grey hair (249), and held a handkerchief in front of his face (249).* He accompanied the man several times to the entrance of the bank to let employees in as they arrived for work. He was unable to identify anyone as the taller man (267).

Plinio Medino, manager of the supermarket across the street from the bank, testified that on May 6, 7, and 8, he observed a blue Cadillac with license number 2, 3, or 5 11SSF (290)** parked near the bank about 7:45 a.m. In the car each day were three men and, although he didn't look at them, they seemed to him to be the same three men (287-289). Medina identified appellant as resembling one of the three men (291-292), but he was not sure (295).

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*After awhile he saw the second man, who was 4 1/2 to 5' tall (252) with long black hair and a moustache, which Leater saw when the man removed the handkerchief while putting money in the sack (253). A few days after the robbery Leater was shown photographs from which he selected one based on the hair and moustache (257). The photograph was of Murphy (258). See 271, where Murphy's neighbor identifies the photo with long hair and moustache as one of Murphy as he looked in early 1974 (272; 275). Another neighbor said Murphy looked that way in the spring (364), but testified that she did not know until July that he had shaved his moustache (364; 377). At trial Murphy had shorter hair and wore no moustache.

**Records of the Motor Vehicles Bureau showed that the car was registered to Murphy (1100-1101).

Other evidence in the case went to bolstering the previously described testimony by showing collateral circumstances.

FBI Agent Stephen M. Carbone testified that on May 9, 1974, from 1:00 to 5:00 p.m. he maintained surveillance at 91 Marcus Avenue (210), where Murphy lived (269-270). At that time he saw a 1966 or 1967 brown Buick Skylark convertible with a ripped back window (210), License No. 626 QIJ in the driveway. An unknown individual finally drove it away (209). The car was also seen on numerous occasions at 254-12 74th Avenue (210). Carbone never saw appellant in the car (210), but on one occasion saw him near it (210(a)). The Buick convertible was registered to William A. Widman, appellant's father, at 254-12 74th Avenue, Glen Oaks (401). License No. 626 QIJ was assigned to a 1968 Cadillac sedan also registered to William A. Widman (402-403). Surveillance was continued at the Marcus Avenue address on and off over the next month (210).

Allan Loughrin, manager of the Ili Kai Hotel in Honolulu (186),* testified that from May 13-17, 1974, Thomas Murphy of 91 Marcus Avenue, New Hyde Park, New York, and Robert Hoffman** of 257-75 74th Avenue, Glen Oaks, New York, stayed at the hotel

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*The cost of a round-trip plane ticket from New York to Honolulu on May 13, 1974, ranged from $280 (charter) to $780 (first class commercial) (352).

**The Government produced testimony that appellant used the name "Robert Hoffman" (284) to apply to rent an apartment on April 21, 1973 (280). The application listed his address as 254-12 74th Avenue (282-283).

in Room 467, and later in Room 2243 (190-192; 197). The two were traveling together (191-193), both indicated they worked for O & C Cab Company, and together they opened a safe deposit box (194-195).* Hotel records indicated that on May 16, 1974, Hoffman called (212) 347-2196 (three times), (212) 347-9770, and (516) 643-4712 (200-201). On May 15, 1974, Murphy telephoned (212) 347-2196; on May 14 he had called (516) 643-4712, and he also called (212) 740-5232 (201-202).

On July 10, 1974, Murphy was arrested at his home. In response to interrogation at home and at FBI headquarters, Murphy denied any knowledge of the bank robbery. He admitted the blue Cadillac in front of his house was his (214), that its license number was 511 SSF, that only he and his wife drove the car, that he and his wife had been to Honolulu (215), and that, in June 1974, they had been to the Bahamas (216). Mr. Murphy said he had been unemployed since January 1974 and that he had previously been employed by O & C Cab Company (216).

On October 2, 1974, Carbone saw appellant and Murphy with a third man in the parking lot of a bar. The Buick with License No. 653 QUN (408)** was parked about forty to fifty feet away (211). A 1965 blue Cadillac with License No. 511 SSF was nearby (212).

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*No money was found in the box, and none was recovered elsewhere.

**That license number was assigned to a car registered to Theresa A. Widman (403).

On that same date Carbone spoke to appellant, telling him that he was investigating a robbery and that Thomas Murphy had been arrested (237). Several weeks later Carbone spoke to appellant again (238).

On December 18, 1974, appellant was arrested. He denied committing a robbery (217), knowing Murphy (220), being in a blue Cadillac (200), or even being at 91 Marcus Avenue (228). He said his residence was 254-12 74th Avenue (220), and stated that his telephone number was 347-2196 (221). He said he was unemployed for about a year, and had worked for the O & C Cab Company (222).

During the course of the discussion on the admissibility of the photograph of Murphy as he looked at the time of trial, counsel for Murphy tried to distinguish between identification testimony and testimony of a mere resemblance (368(a)). To this distinction, Judge Mishler responded:

> You can use any fancy word that you want. I don't know what the difference is, but you can argue that before the jury.
>
> To me if something looks like a duck and walks like a duck it's a duck. I don't care if you say it resembles a duck, and I'll eat it when I order a duck. So that has nothing to do with it.
>
> (369).

As indicated earlier, prior to trial counsel made a motion to preclude testimony of the identification of appellant because of suggestive pretrial identification procedures. Before the last witness completed testimony, Judge Mishler held:

> Concerning the identification, the in-court identification of Mrs. Jonke, of Mrs. Daly, of Mrs. Ransom and of Mr. Medina identifying the defendant Robert Widman, I find that the procedures employed were fair, the procedures were not fully suggestive. The witnesses' in-court identification was based on what the first three witnesses saw in the bank, and what Mr. Medina saw on the three days he walked down the street and past the blue car.
>
> (S.H. 198).

He went on to say:

> The strange thing about this hearing is that I think about 50 per cent of it was unnecessary. First, if someone cannot make an in-court identification, there is no sense in my making the determination that whether or not the procedures were fair and whether it was unduly suggestive, whether it was based on what the witness recalls.
>
> (S.H. 198-199).

In his charge to the jury* on identification, Judge Mishler stated:

> The evidence in the case includes testimony by Alice DeChiara, Lottie Hoggard, and Joseph Leader, on a prior photographic identification from a spread or spreads of photographs. There has been in-court identification of Mr. Widman -- and I shouldn't say identification. I should say there is some testimony given by Christina Jonke, Marie Daly, Barbara Ransom and Plenio Medina in Court where the witnesses pointed out with varying degrees of certainty that the defendant Robert Widman was the taller of the bank robbers.
>
> There has also been prior photographic identification by Mrs. Jonke and Mrs. Daly

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*The complete charge is "C" to appellant's separate appendix.

> of the defendant Robert Widman as the taller bank robber.
>
> There has also been testimony -- and I can't recall the witness that identified the defendant Robert Widman in the lineup....
>
> (594).

However, throughout the remainder of the charge on this issue, the Judge referred to the testimony of the witnesses as "identification testimony," despite the nature of the original observations of the witnesses (595-596). Then the Judge gave to the jury the issue of whether the pre-trial identification procedures were fair (598).

After deliberations, the jury found both defendants guilty of bank robbery while armed, and conspiracy.

## ARGUMENT

IT WAS ERROR TO ADMIT TESTIMONY THAT APPELLANT WIDMAN WAS ONE OF THE BANK ROBBERS BECAUSE SUCH TESTIMONY WAS THE RESULT OF PRETRIAL IDENTIFICATION PROCEDURES WHICH WERE IMPERMISSIBLY SUGGESTIVE.

### A. The testimony relating to what was seen at the time of the crime

The bank was robbed by two men. The Government's theory was that appellant was the taller of the two men involved in the robbery. In support of this theory, the Government called as witnesses those who observed the events. However, each witness who was present at the bank during the robbery testified that it was not possible to see the robber's full face because, from the bridge of the nose down, his face was covered by a handkerchief. The witnesses were able to observe only that the robber had light brown or blond hair which was thinning at the top, that his hair was combed into a pompadour, that his face and eyes had a certain shape and, most outstanding, that he was a very large person -- about 6'1" tall and weighing more than 200 pounds. Thus, it is clear from the testimony that the observations of every Government witness were limited to certain specific characteristics of the taller robber.

B. The effect of the pre-trial identification procedures

Despite the fact that the witnesses had not seen the robber's face, they were, subsequent to the crime, involved in the usual identification procedures. Within approximately one month after the robbery, a set of small photographs was shown to Mrs. Daly, the chief clerk, present at the time of the crime. This set of photographs consisted of candid shots of heavy-set men with thick necks. The hair color and style is not readily discernible, but the faces of the individuals photographed are quite clear. Not surprisingly, in view of the spread, Mrs. Daly was not able to make a selection of a photograph, although appellant's photograph was included.

In October 1974 a second set of photographs was shown to the witness. This spread consisted of twelve high gloss photographs, one full face and one profile, of each of six men. The photographs showed men who looked quite different from appellant, particularly as to those few features attributed to the robber. In the first, the subject was thin, his hair had a side part, and was combed to the side. His nose was straight. In the second, the person had dark hair parted to the side, and a full face. In the third, the man had flat hair with a deeply receded hairline and protruding ears. The fifth and sixth photos showed men with side parts, and the sixth had flat hair. Only appellant's photo, the fourth (Exhibits #1, #1A) showed

a pompadour hairstyle with a broad neck and marked skin.

Each of the witnesses testified that he selected appellant's photograph from the set because it was the only one with the characteristic hairline, hairstyle, and shape of eye. Mrs. Jonke testified that, to make her selection, she concentrated on the shape of hairline and face, and recalled no other photograph with a similar style and hairline. She acknowledged that she was only "pretty sure" that her selection was of the photograph of the man she saw.

Ms. Daly's testimony was similar. Her selection of appellant's photograph occurred because it was the only one with the features she recalled from the day of the crime. She was not sure her selection was the man. Indeed, she testified she was selecting a "type."

Then came the line-up. It consisted of six men of varying heights. Appellant was fourth in the line. Of the participants involved, two were noticeably smaller than the others, and only appellant had a pompadour hairstyle. Mrs. Jonke testified that she concentrated on the hairline and body frame and, as with the photographic spread, no one else had those similar features.

Mrs. Daly went only so far as to say that man number four in the line-up resembled the robber.

Ms. DeChiara testified that she selected appellant from the line-up because she felt he was the person. She testified that all she ever said was that he was a "big person" who "had

a blond bit of hair." Ms. DeChiaro was quite precise in believing that it was the characteristics of the line-up participants which required her choice:

> ... There were -- there was for instance like there was a person that was like might have been called husky, but he was very much shorter. There was a person that had very kinky type of hair and he was very tall and very severe, and he didn't have -- I don't think anybody was there that resembled the person that I thought might be except the person that I picked out.
>
> (145-146).

Critical to a determination of whether an identification procedure was unnecessarily suggestive was the opportunity of the witnesses to view the actor. Neil v. Biggers, 409 U.S. 188, 199 (1972); United States ex rel. Phipps v. Follette, 428 F.2d 912 (1970), cert denied, 407 U.S. 908 (1971). Here, the witnesses by their own testimony stated that they could not observe the robbers' faces and could see only certain features. Their testimony then goes on to reveal that the identification procedures were suggestive in both the photographic spreads and the line-up in that the only person with the described features, especially the hairstyle, was appellant. As with race or scars, where the hairstyle was such a prominent feature, the photographs or the line-up should have included more than one which displayed the feature. Indeed, in United States v. Fernandez (II), 480 F.2d 736 (2d Cir. 1973), this Court made clear that when hairstyle is the prominent feature it is

not acceptable for the suspect alone to be displayed with such a feature. The ease with which this characteristic can be simulated makes it inexcusable that the feature was not part of the appearance of the others. See United States v. Reid, slip op. 3073, 3098 (2d Cir., April 24, 1975). As a prominent commentator has made clear:

> Another factor which may increase the suggestion inherent in a show-up relates to the clothing worn by the suspect. It has already been noted that where a similarity exists between the physical characteristics of the perpetrator of the crime and those of a suspect, this similarity may cause a false recognition and an erroneous identification. A false recognition may also be caused by a similarity in clothing, for the clothes worn by the criminal may have made, consciously or subconsciously, a greater impression upon the mind of the witness than any physical characteristic.
>
> Wall, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES, 31 (Thomas 1965).

Indeed, the suggestive procedures comparable to those used here are chronicled:

> Assuming that a sufficient number of persons are available to form a proper line-up (at least five or six, and more if possible), the next question concerns the physical characteristics of those persons. Obviously, they should be approximately the same as those of the suspect. If they are not, if the line-up is so composed as to suggest to the witness that the suspect is "the man to be identified," then any identification may considered to have little probative value. Indeed, a line-up may be constructed so as to be "little more than a farce," by provoking

"identification through accentuation," and it may do this in a number of ways. A suspect who is a member of one race or nationality may be placed among members of a noticeably different race or nationality. In a Canadian case, for example, the defendant had been picked out of a line-up of six men, of which he was the only Oriental. In other cases, a black-haired suspect was placed among a group of light-haired persons, tall suspects have been made to stand with short non-suspects, and, in a case where the perpetrator of the crime was known to be a youth, a suspect under twenty was placed in a line-up with five other persons, all of whom were forty or over. Line-ups such as these, of course, are grossly suggestive, and identifications which they produce can in no sense be said to have been independently obtained. There is little excuse for the employment of such improper procedures.

A sometimes difficult problem is posed when the suspect has an unusual physical characteristic which noticeably sets him apart from the normal individual. If a witness should pick this suspect out of the line-up, it is possible that the identification was influenced by the distinguishing characteristic, which may or may not have been possessed by the perpetrator of the crime. It has been reported, for example, that ten witnesses who had seen a robbery committed by a man with a large scar over his ear picked out of a line-up an innocent man who, unlike the others, had a similar scar. These identifications were based, no doubt, upon the scar rather than any other factor. In order to avoid this source of suggestion, it has been proposed that whenever a suspect who has a noticeable abnormality or defect is to be placed in a line-up, it should be concealed or, if that is not possible, all members of the line-up should be made to appear as if they were similarly afflicted.

Id. at 53-54.

The result of the suggestive procedures used here was to provide for the viewers of the crime a person to whom to attach their recollection of specific qualities when those qualities might, as the witnesses themselves stated, have attached to someone else.

It is interesting to note how the testimony of the witnesses in this case differed from the witness in United States v. Yanishefsky, 500 F.2d 1327 (2d Cir. 1974), where a similar argument was made by the defendant and rejected. There, this Court found that the witness' reference to the height and haircolor of the person who was seen committing the crime was in response to an inquiry about the photographs used in a spread, and that there was no evidence in the record that the witness' view was inadequate. Thus, this Court concluded, the witness was able to make a clear visual and mental impression of the actor. In this case, the evidence is entirely to the contrary.

C. The Trial

Judge Mishler denied the motion to suppress, saying that the witnesses had testified from their recollections at the scene of the crime. What makes this case unique is that he was partially correct and partially incorrect. While the witnesses did recall from their experiences in the bank certain features of the robber, it was the suggestive pretrial procedures which tied the witnesses' real memories to a particular individual and produced an identification of appellant Widman.

Further, the selection of appellant by each witness was reinforced by the procedure of having him identified at the suppression hearing which occurred just prior to trial.

At trial, Mrs. Jonke identified appellant as the taller of the two robbers after saying that she could not see the robber's face and recalled only his hair and size. Mrs. Daly stated that appellant was the robber, but premised her conclusion on his build, hairline, and forehead, and acknowledged she could be mistaken. Ms. DeChiara said only that appellant resembled the robber and identified him only because of his hair and size.

While the testimony of these witnesses about hair and size was an accurate reflection of their memories, the identification of appellant could only have been the result of the procedures which compelled attaching the described characteristics to him. Thus, what was required in this case was preclusion of testimony about the results of the prior identification procedures -- that is, the identification of appellant as one of the robbers. Further, since the testimony shows it was these procedures rather than what the witnesses observed that produced their in-court identifications, such in-court identifications should have been precluded as well.* The relief is required because of the unique effect of the suggestive procedures used in this case.

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*This would not preclude testimony of the observations the witnesses made at the time of the crime.

It is the unique facts which make decisions like United States v. Evans, 484 F.2d 1178 (2d Cir. 1973), and United States v. Fernandez, supra, irrelevant to the present case. In those cases, it was argued for the defense that the witnesses should not be allowed to express to the jury their opinions that the defendants resembled the persons who had committed the crimes. In both cases, the argument was rejected because the witnesses had a clear view of the person committing the crime. This clear view in good light permitted the witness from his own experience to articulate his opinion on the identity of the robber. To the contrary, here there is no such basis for an opinion, because the witnesses, by their own testimony, did not see the face of the robber. It must also be emphasized that, in Evans, the pretrial photographic spread was fair and unchallenged. Thus, there was not even a question of influence by unfair factors on the memory of the observer.

The weakness of the identification is seen by the inability of several of the witnesses who testified to having seen the features to make an identification of appellant. Thus, Mrs. Ransom, who looked at the taller robber for six or seven seconds and saw he had light colored hair on the top of his head, was unable to identify anyone in the October photographic spread. Then at trial she selected both appellant and a United States Marshal as the robber, and, after identifying appellant, agreed there was only a 50-50 chance he was

the man and that she could not definitely identify him.

Ms. Hoggard also remembered a tall, heavy man with blond hair, but she could make no identification.

Joseph Leater, who went to and from the bank door with the robber several times was also unable to make an identification.

It must be noted that the weakness of the identification in this case extended as well to the co-defendant, Murphy. Ms. Daly could not identify him; Ms. Ransom could not identify him in the photographic spread, and did so in the courtroom because he was the shorter of the two defendants; Ms. DeChiara selected a photograph of the co-defendant, but said she was only 80% sure of her choice and then failed to identify him in a line-up; Ms. Hoggard selected a photograph of Murphy based on hair, moustache, and eyes, but was not sure if the man she selected was the robber; and Leater selected a photograph of Murphy based on hair and moustache. This weak identification came even though the shorter robber, unlike the taller one, dropped his handkerchief for several minutes and was observed without it by Ms. Hoggard and Ms. DeChiara.

The error of permitting the witnesses to associate their memories of the robber with appellant after the suggestive procedures was made more serious by Judge Mishler's constant reference to the witnesses' testimony as "identification" testimony when indeed it was not that at all. There are indica-

tions that Judge Mishler recognized the distinction, for at one point he stated that the suppression hearing was unnecessary because there was no identification, and in his charge at a single point he corrected a statement to reflect that there was no identification. However, even this hint of the distinction between recollection of features and identification is buried by his refusal to accept counsel's argument on this point by his statement that a duck is a duck even if it is called something else, and by the specific, numerous references to "identification testimony" in his charge.

D. Prejudicial error requires reversal

The bulk of the other evidence presented by the Government was an attempt to establish that appellant and Murphy knew one another, that after the crime they travelled to Hawaii together, and that appellant gave a false exculpatory statement at the time of his arrest. This evidence does not go to the underlying question of whether appellant was the person who participated in the robbery. Without valid evidence of appellant's presence at the bank, the proof of the acquaintance with Murphy and the trip to Hawaii have no significance. Indeed, this Court has held that proof of false exculpatory statements given in suspicious circumstances is not sufficient to take the place of proof of the elements of the crime in question. United States v. Johnson, slip opinion 2673 (2d Cir., April 1, 1975).

There can be no question that the testimony that appellant was the man involved was critical to the jury's deliberation. Accordingly, the fact that it was obtained as a result of unconstitutional identification procedures and then admitted into evidence was so prejudicial as to demand a new trial.

The Judge's charge permitting the jury to decide the issue of suggestiveness in determining how to evaluate the evidence does not cure the initial error in permitting the evidence to come in at all. The Judge is charged with the responsibility of making an initial determination of suggestiveness, and here that determination was error.* See United States v. Bryant, 480 F.2d 786, 789 (2d Cir. 1973).

## CONCLUSION

For the above-stated reasons, the judgment below must be reversed, the testimony concerning the identification of appellant as the robber suppressed, and a new trial granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ROBERT WIDMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

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*Indeed, it is incredible to believe that the jury could disregard this testimony, especially when the court described it as "identification" testimony. Bruton v. United States, 391 U.S. 123 (1968).

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Phyllis Steinberg

5/19/75